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In the Matter of
Toll Free Service Access Codes

CC Docket No. 95-155

REPLY COMMENTS OF THE
NEW YORK CLEARING HOUSE ASSOCIATION

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TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	ii
INTRODUCTION.....	1
COMMENTS	2
I. THE COMMISSION SHOULD PROMOTE EFFICIENT USE OF TOLL FREE NUMBERS.....	2
A. An Escrow Requirement Does Not Promote Efficiency	3
B. The Commission Should Enact Rules That Minimize Number Brokering.....	4
C. The Commission Should Encourage Use of Personal Identification Numbers or “PIN” Technology.....	4
II. VANITY NUMBERS	6
A. Protecting Sensitive Numbers Will Not Lead to the Premature Depletion of Toll-Free Numbers	7
B. Granting a Right of First Refusal Is in the Public Interest	7
C. A Right of First Refusal Should Be Combined With Delayed Assignment.....	11
D. Trademark Law Provides Insufficient Protection for Sensitive Numbers	11
III. ASSIGNMENT BASED ON INDUSTRIAL CLASSIFICATION FAILS TO PROTECT THE TOLL-FREE NUMBERING SYSTEM.....	12
IV. GATEWAY INTERCEPT SHOULD BE OPTIONAL.....	12
V. CARRIERS MUST COLLECTIVELY CONDUCT A BROADBASED MULTIMEDIA EDUCATION CAMPAIGN.....	13
CONCLUSION	14

SUMMARY

The New York Clearing House Association (“NYCHA”), an association of financial institutions including the leading banks of New York, submits these reply comments in response to proposals made in the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Public Rulemaking regarding the institution of the new 888 Service Access Code.

NYCHA members are large users of 800 numbers generating significant business revenues and minutes of use from their 800 services. The reliability and utility of their toll-free services depends upon a toll-free number assignment process that is stable and does not unduly confuse toll-free callers. Accordingly, NYCHA members are very interested in the allocation and preservation of toll-free numbers.

NYCHA supports the comments filed by the 800 Users Coalition. NYCHA, like the 800 Users Coalition, urges the Commission to enact rules that protect the existing toll-free number assignment system, minimize caller confusion, and encourage efficient use of numbering resources. To achieve these goals, the Commission should, at a minimum: (1) grant existing 800 number assignees a right of first refusal regarding equivalent 888 numbers, without requiring payment of an additional fee; (2) reward toll-free customers who report unlawful number brokers by stripping the broker of the number and assigning it to the whistle-blower; (3) allow toll-free customers to use an optional gateway intercept to reduce misdialed calls; and (4) require an effective

multimedia education campaign to acquaint the calling public with new toll-free dialing sequences.¹

A right of first refusal will protect existing investments in 800 numbers, protect new entrants from expensive and resource depleting misdials, and advance the Commission's goal of efficient use of the number pool. The data in this record suggest that only a small percentage of 800 numbers would be replicated in subsequent 8YY SACs. Protecting sensitive 800 numbers, therefore, will not result in the rapid depletion of toll-free numbers.

Enacting rules that encourage whistleblowers further preserves scarce resources by preventing number brokers from profiting from the "sale" of a public resource.

Optional call intercept services will allow 800 users to minimize misdials and mitigate consumer confusion resulting from the proliferation of toll-free codes.

Finally, requiring carriers (LECs and IXC's) to educate the calling public about the introduction of additional toll-free codes will prevent unnecessary misdials, and reduce consumer confusion and frustration.

¹ NYCHA also urges the Commission to consider assignment of 8YY service access codes according to service and to require the use of personal identification number or "PIN" technologies when a toll-free customer uses large pools of toll-free numbers for low volume applications.

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INTRODUCTION

² *In the Matter of Toll Free Service Access Codes*, CC Docket No. 95-155, Notice of Proposed Rulemaking, FCC 95-419, released Oct. 5, 1995 ("Notice" or "NPRM").

protect “sensitive” 800 numbers³ and require adequate caller education efforts by the carriers.

NYCHA serves primarily as a clearinghouse through which members settle accounts and present checks and other payment instruments. It also represents its members in regulatory matters on issues of common concern. NYCHA members include the leading banks in New York.⁴ NYCHA members rely upon 800 service to meet a variety of their business needs, including customer service centers, technical support centers, and various financial transaction and data services.

COMMENTS

NYCHA generally supports the positions advocated by the 800 Users Coalition on each of the issues discussed below.

I. THE COMMISSION SHOULD PROMOTE EFFICIENT USE OF TOLL FREE NUMBERS.

NYCHA supports the Commission’s efforts to ensure that toll-free numbers are assigned and used efficiently. As discussed in the sections that follow, a refundable deposit requirement for toll-free numbers does not achieve

³ NYCHA categorizes as “sensitive” those numbers that are widely disseminated to the public, have recognized mnemonics, or produce high calling volumes.

⁴ The members of the New York Clearing House Association are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Bankers Trust Company, Marine Midland Bank, United States Trust Company of New York, NatWest Bank, N.A., European American Bank and Republic National Bank of New York.

this goal. Encouraging the use of personal identification number (“PIN”) technology does.

NYCHA also urges the Commission to consider fully the “SAC by service” proposal described in the comments of the 800 Users Coalition.⁵ The proposal appears to be a promising solution to the problems raised by the introduction of new toll-free service area codes (“SACs”) and merits further exploration in the course of this rulemaking.

A. An Escrow Requirement Does Not Promote Efficiency.

NYCHA agrees with the 800 Users Coalition that a one-time deposit of a refundable fee into an escrow account for each toll-free number held in reserved status would not be a powerful enough deterrent to discourage inefficient use, unlawful number brokering, or “warehousing” because it is only a temporary cost.⁶ Instead, a refundable deposit creates a substantial barrier to toll-free services for small businesses and establishes burdensome and costly housekeeping requirements for the Commission, the North American Numbering Plan (“NANP”) administrator, and all 800 users. Because a deposit requirement hinders rather than furthers the Commission’s goals, the Commission should abandon its proposal to impose a deposit requirement.

⁵ Comments of the 800 Users Coalition at 9-13.

⁶ *Id.* at 4-5.

B. The Commission Should Enact Rules That Minimize Number Brokering.

The Commission should take steps to address the gross inefficiencies in the use of the NANP, and the resulting unnecessary user costs, introduced by the actions of number brokers. The Notice implies that the existing rules against selling or bartering numbers effectively discourage number brokers already.⁷ Contrary to that suggestion, unlawful brokering, and the resulting inefficient use of numbers, will likely continue until the Commission establishes incentives for users to blow the whistle on number brokers.⁸

Like the 800 Users Coalition, NYCHA urges the Commission to adopt a rule that rewards whistleblowers with the brokered number.⁹ This approach would create an incentive for whistleblowers to come forward and ensures that numbers are available for their most productive and efficient use.

C. The Commission Should Encourage Use of Personal Identification Numbers or "PIN" Technology.

PIN technologies conserve the supply of assignable toll-free numbers and reward efficient number use. NYCHA urges the Commission to require PIN technologies for new toll-free applications when they consume large

⁷ The Commission and the NANP Guidelines prohibit number brokering and require that a Responsible Organization ("RespOrg") strip a broker of a number that it tries to sell or barter. See, e.g., *Industry Guidelines for 800 Number Administration*, § 2.2.1 (June 8, 1995); and NPRM at ¶ 16 and n.41.

⁸ Under the NANP Guidelines, a number will be stripped from a broker and returned to the spare pool if the attempt to sell the number is reported. But the reporting user has no assurance that it will be able to obtain the number it sought.

⁹ See Comments of the 800 Users Coalition at 6.

pools of numbers for services with low calling volumes (e.g., paging and personal toll-free services). PIN technologies would significantly delay the exhaustion of SACs by toll-free customers who use individual 800 numbers for applications with extremely low usage per number. As a matter of equity and economic efficiency, a PIN requirement would also force toll-free service providers who use toll-free numbers inefficiently to absorb the costs of their own service (i.e., the costs of PIN equipment), rather than exporting those costs to more efficient users in the form of premature exhaustion of toll-free SACs. Thus, a PIN requirement would encourage more efficient use of numbering plan resources.

A PIN technology requirement would not place any provider at a competitive disadvantage. If the Commission mandated the use of PIN technologies for all users with a high volume of number assignments and a low volume of traffic, competing service providers would be subject to the same requirement. NYCHA agrees with the Coalition that, in developing a number-to-traffic ratio that would trigger a PIN requirement, the Commission should consider the costs and benefits of such a requirement.¹⁰ The Commission should include in that calculus (1) the equipment costs associated with PIN technologies; (2) the customer base over which providers would recover such costs; and (3) the costs (both direct and indirect) of revamping the public switched network to expand the supply of operational toll-free SACs if PIN

¹⁰ *Id.* at 7-8.

technologies are *not* used for low-intensity lines. Given the Commission's goal of efficient number usage, the benefits of PIN technology for low usage/high number services far outweigh the costs.

II. VANITY NUMBERS.

The Commission must reject any suggestion that sensitive numbers do not deserve protection or that the protection of sensitive numbers is not in the public interest.¹¹ Many businesses have been built around a particular toll-free number. Moreover, toll-free services have introduced significant efficiencies in the delivery of services and products that have benefited manufacturers, customers, retailers, service providers, and the nation's economy. Consumers rely on sensitive 800 numbers for diverse services ranging from placing orders to responding to product recalls, notifying banks of lost or stolen credit cards, and obtaining information or placing reservations. Toll-free service has increased the availability and efficiency of all of these functions.

Sensitive numbers require special protection, not only to preserve the existing 800 market, but also to protect (1) existing assignees who have invested significant resources in toll-free service and in their toll-free number; (2) new toll-free customers who would be saddled with high costs and service degradation as a result of customer confusion and misdialing; and (3) the calling public who would experience frustration, delay, and inconvenience from

¹¹ Holders of "vanity" numbers and holders of high volume numbers deserve the same protection. Like the 800 Users Coalition, NYCHA defines "sensitive" to include both.

misdialed or misdirected calls. NYCHA urges the Commission to provide this protection.

A. Protecting Sensitive Numbers Will Not Lead to the Premature Depletion of Toll-Free Numbers.

Protecting sensitive numbers by replicating them in new SACs or otherwise limiting their availability to new toll-free customers will not deplete new SACs prematurely. Data collected by the 800 Users Coalition indicates that only 6% of existing 800 numbers would be protected by existing users.¹² Data collected from NYCHA's own members validates the Coalition's data. Data from the members who were able to compile the necessary information, suggests that only 5% of 800 numbers held by NYCHA members are "sensitive" numbers that members would need protected in the 888 SAC.¹³

With 6% or fewer of existing 800 numbers classified as sensitive, the potential costs of protecting sensitive 800 numbers would be minimal compared to the costs associated with failing to protect 800 numbers.

B. Granting a Right of First Refusal Is in the Public Interest.

NYCHA urges the Commission to adopt the Notice's proposal to establish a right of first refusal to protect sensitive 800 number assignments.¹⁴ For the reasons identified by the 800 Users Coalition, the public interest would be served by protecting sensitive 800 numbers through a right of first refusal.¹⁵

¹² Comments of the 800 Users Coalition at 16.

¹³ One third of the members were able to compile the necessary data.

¹⁴ NPRM at ¶ 42.

¹⁵ Comments of the 800 Users Coalition at 18-20.

The calling public benefits from a right of first refusal because numbers with name recognition would be reachable in either SAC, thus preserving the accessibility of the 800 customer's services and products. Customer confusion, delay, and misdirected calls would be significantly reduced because callers would not be required to accurately recall three additional digits to place a toll-free call.

A right of first refusal would also permit 800 customers to protect their investments in their 800 numbers. Many 800 customers have spent millions of dollars marketing their numbers, developing customer recognition for their sensitive numbers, and investing in the equipment and technology used to integrate toll-free calling into the user's services. If a sensitive 800 number is assigned to a different user in the 888 SAC, the 800 customer's investment is at a significant and unnecessary risk of unfair business practices or caller frustration and dissatisfaction. Moreover, both the 800 user and the 888 user will be burdened by potentially huge charges for misdialled calls.

A right of first refusal also protects new entrants. As described by the 800 Users Coalition, a new entrant who is assigned the 888 equivalent of a high volume 800 number could receive thousands of misdirected calls that would destroy the value of the 888 service.¹⁶ The new entrant's investment in the number would not only be lost but its costs would increase because it would be forced to pay for misdirected calls while its own customers could not get through.

¹⁶ *Id.* at 19.

Finally, a right of first refusal benefits the public interest by reducing the efforts and resources that the Commission is required to devote to resolving disputes over number brokering and the assignment of numbers. Moreover, number speculators will be prevented from obtaining the 888 equivalent of a sensitive 800 number in order to extract an unlawful brokering fee from the 800 user.

In short, a right of first refusal furthers the Commission's goals of promoting efficient and effective use of the toll free numbering pool.

NYCHA joins the 800 Users Coalition and others who oppose proposals to require a fee for the exercise of a right of first refusal.¹⁷ Existing 800 customers have invested substantially in the use of their numbers and to promote their numbers to the calling public. Their investments have stimulated the value and development of toll-free services and have contributed to the carriers' recovery of their costs for toll-free network facilities. Existing 800 customers should not be penalized for seeking to protect their investment nor should they be forced to pay twice for it.

If the Commission nevertheless imposes fees for the exercise of a right of first refusal, those fees should be designed to encourage and reward *efficient* use and penalize *inefficient* use. Those goals can only be achieved if the applicability of the fee is pegged to the 800 customer's efficient use of the

¹⁷ See Comments of the 800 Users Coalition at 20; See, e.g., Comments of ARINC at 4, n.4; Comments of Crestar at 1; and Comments of NIMA International at 8.

number.¹⁸ Therefore, the Commission should require a fee only from users whose calling patterns fall below a usage-based threshold of efficiency, and not from users with historically intensive, highly efficient usage patterns.

NYCHA supports commenters like the 800 Users Coalition who observe that competitive bidding is fundamentally inconsistent with a right of first refusal.¹⁹ Users who can obtain an 888 number only by competing successfully in an auction do not have an effective right of first refusal. By definition, a right of first refusal would permit the holder of an 800 number to obtain the equivalent number in other SACs first, before the number is made available to other claimants. Competitive bidding, by contrast, awards the number to the highest bidder.

Moreover, an auction would penalize users who have invested in a number -- the better the job the company did in promoting the 800 number, the more desirable the number would be to others and the more the company would have to pay at auction to retain the 888 equivalent number. Thus, to preserve a company's investment in its 800 number, the company pays twice: once for the initial promotion and publication of the 800 number, and a second time for the 888 equivalent.

¹⁸ See Comments of the 800 Users Coalition at 20-21.

¹⁹ See Comments of the 800 Users Coalition at 21; *See, e.g.*, Comments of Bass Pro Shops at 4; Comments of the Weather Channel at 4-5; and Comments of American Petroleum Institute at 3-4.

C. A Right of First Refusal Should be Combined with Delayed Assignment.

Like the 800 Users Coalition, NYCHA urges the Commission to implement a right of first refusal in conjunction with the delayed assignment of the 888 equivalents of sensitive 800 numbers.²⁰ Delayed availability would allow sensitive 800 numbers to be temporarily withheld from the 888 assignment pool until the pool of non-sensitive numbers is exhausted. By delaying assignment of these numbers, the Commission would also increase the chance that the 800 subscriber would no longer consider the 888 equivalent to be “sensitive” by the time it is available for assignment.

D. Trademark Law Provides Insufficient Protection for Sensitive Numbers.

Commenters opposing protection for sensitive numbers claim that adequate protection is available through trademark law.²¹ These commenters, however, ignore or sidestep the current split in the Second and Third Circuits on the application of trademark protection,²² and the fact that, under trademark law, holders of high volume numbers with no mnemonic value have no protection. Numbering assignment and administration policies are not issues for the courts. They are telecommunications matters properly resolved by the Commission.

²⁰ Comments of the 800 Users Coalition at 23. See, e.g., Comments of American Petroleum Institute at 4-5; and Comments of General Services Administration at 3-4.

²¹ Comments of Joseph E. Page at 3-4; and Comments of Joel DeFabio at 1-2.

²² Compare *Dial-A-Mattress Franchise Corp. v. Page*, 880 F.2d 675 (2d Cir. 1989); and *Dranoff-Perlstein Assocs. v. Sklar*, 967 F.2d 852 (3d Cir. 1992).

The Commission should therefore take affirmative steps to protect the 800 toll free market and the integrity of the numbering system.

III. ASSIGNMENT BASED ON INDUSTRIAL CLASSIFICATION FAILS TO PROTECT THE TOLL-FREE NUMBERING SYSTEM.

Most comments filed by users of 800 numbers oppose the Commission's proposal to use the Census Bureau's Standard Industrial Classification ("SIC") codes to deny 888 equivalents to a competitor of the 800 number assignee.²³ NYCHA agrees that SIC codes are not useful for this purpose because they are both over- and under-inclusive. The SIC code classification system groups non-competing companies together, while companies that compete do not always have the same SIC code. NYCHA agrees that the SIC system works in theory but not in practice.

IV. GATEWAY INTERCEPT SHOULD BE OPTIONAL.

NYCHA supports gateway intercept as an *optional* method of protection against misdialed calls, but opposes mandatory gateway intercept services. Toll-free service customers should be free to choose a call intercept service if it is appropriate for their toll-free application. If, however, the 800 user determines that call intercept would introduce significant post-dial delay or would cause caller confusion, that user should be able to elect not to use intercept services.

²³ Comments of the 800 Users Coalition at 22-23; Comments of Bass Pro Shops at 5-6; Comments of Service Merchandise at 6; and Comments of American Petroleum Institute at 5.

V. CARRIERS MUST COLLECTIVELY CONDUCT A BROADBASED MULTIMEDIA EDUCATION CAMPAIGN.

NYCHA commends the Commission and those carriers that have stepped up to the plate on the issue of caller education. This initiative is a good start, but the Commission must ensure that additional efforts are undertaken to educate the public. Without adequate public education, the introduction of the new 888 SAC will produce caller confusion, misdialed calls, and costly disruption to existing 800 services.

NYCHA strongly supports an expanded, aggressive caller education campaign to acquaint the general public with the concept of toll-free numbers in addition to the 800 SAC. Like the 800 Users Coalition, NYCHA urges the Commission to require all carriers to: (1) share in the costs of educating the public; (2) collectively conduct a multimedia campaign that covers all markets, not just the top 35 geographic markets; and (3) invest, at a minimum, the same resources in terms of media, scale, scope, and effort that local exchange companies historically use to introduce changes in local numbering plans. Carriers are best positioned to educate the general public regarding changes in the delivery of telecommunications services.²⁴ NYCHA urges the Commission to ensure that all carriers undertake and fund adequate efforts to assure that the public is aggressively educated about the introduction of new toll free dialing codes and misdialed calls.

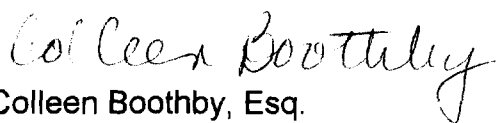
²⁴ In the case of toll-free services, FCC oversight is required because carriers have little incentive to invest in an education campaign to reduce misdials -- they are paid regardless of whether the call is misdirected.

CONCLUSION

The Commission must ensure that the quality and utility of toll-free service is preserved. To do so, the Commission must protect users' investment in toll free numbers and services and must reduce customer confusion associated with the introduction of new 8YY SACs. At a minimum, the Commission should (1) grant existing 800 customers a right of first refusal with respect to the 8YY equivalents of users' sensitive 800 numbers; (2) modify its rules and the industry's guidelines prohibiting number brokering to give a whistleblower the number held for unlawful ransom by a broker; and (3) require all carriers to conduct expanded caller education programs. In addition, the Commission should delay assignment of sensitive numbers and make call intercept available to toll-free number holders *as an option*.

These measures and related remedies described above will preserve and enhance the value of toll-free services while furthering the Commission's statutory and regulatory goals.

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CERTIFICATE OF SERVICE

I, Meredith Forman, hereby certify that true and correct copies of the foregoing Reply Comments were served by hand-delivery on this 20th day of November, 1995 upon the following parties:

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